Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1971

No. ~~1092~~ 70-54

VICTORY CARRIERS, INC., SS SAGAMORE HILL
and
GULF STEVEDORE CORP., PETITIONERS

v.

BILL LAW, RESPONDENT

ON PETITION FOR REHEARING

BRIEF ON BEHALF OF AMERICAN TRIAL LAWYERS ASSOCIATION AS AMICUS CURIAE

AMERICAN TRIAL LAWYERS ASSOCIATION
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Blanchard Press, Inc., Boston, Mass. — Law Printers

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The American Trial Lawyers Association, Admiralty Section, respectfully prays that this Honorable Court rehear the above-entitled action.

I.
Standing

The American Trial Lawyers Association is a national bar association whose membership exceeds 25,000 lawyers who are primarily engaged in the practice of law on behalf of plaintiffs in personal injury litigation. The admiralty section of this association includes most of the attorneys who specialize in the maritime personal injury law. These attorneys represent seamen, longshoremen and other maritime workers who are engaged in a hazardous industry and, as such, are recognized as having a special status by virtue of legislation and decisions of the courts.

This Association and the people it represents are directly affected by the judicial application of the doctrine of unseaworthiness to dockside personnel injured as a result of stevedore's equipment. More specifically, this Association is vitally concerned with this appeal, not only for the instant case, but also for the effect this result will have on similar cases now existing throughout the country.

As a resolution of the issues in this case will materially affect the outcome of many others, this case assumes a position of major importance to thousands of maritime workers, the maritime industry and the admiralty bar.

The American Trial Lawyers Association, Admiralty Section, has been permitted to file briefs Amicus Curiae with this Honorable Court on behalf of seamen and longshoremen in other cases.

II.
Question Presented

Is it appropriate for this Honorable Court to rehear the case of *Victory Carriers, Inc.* v. *Law*, No. 70-54 (December 13, 1971) where the opinion in that case is contrary to reason and the Constitution?

III.
Summary of Argument

It is appropriate for this HONORABLE COURT to rehear the above-entitled action.

It was decided that federal maritime law would be applied if this case were

> "... within the admiralty and maritime jurisdiction conferred on the district courts by the Constitution and the jurisdictional statutes."

No admiralty and maritime jurisdiction was found and recovery was denied.

The case was in fact within the admiralty and maritime jurisdiction of the federal courts. The Extension of Admiralty Jurisdiction Act, 62 Stat. 496, 46 U.S.C. §740 (1964), expressly granted jurisdiction of the case at bar. The precedent existing at the time the Constitution was adopted also indicates the presence of admiralty and maritime jurisdiction.

Furthermore, it is not at all clear that the substantive maritime law is only applicable within the geographic confines of the admiralty and maritime jurisdiction of the federal courts. The General Maritime Law is a composite of many non-federal contributions from state and pre-Constitution sources. There has never been even a suggestion prior to the December opinion that limitations in federal jurisdiction could also limit the scope of the General Maritime Law.

The "savings to suitors" clause of 28 U.S.C. §1333 (1964), expressly preserves state remedies, including state jurisdiction. Since the above-entitled action was heard under diversity jurisdiction, 28 U.S.C. §1332 (1964), as well as under admiralty and maritime jurisdiction, 28

U.S.C. §1333 (1964), it would seem that the jurisdiction of the diversity court would be as expansive as that of a state court sitting within that federal district. If a cause of action for unseaworthiness were within the jurisdiction of a state court, that cause of action would be within the jurisdiction of the diversity court. Indeed, state courts have exercised jurisdiction and applied the warranty of seaworthiness to the facts at bar.

Significant authority also stands for the proposition that states may add to the rights in the General Maritime Law as well as to the remedies. State courts have in fact applied the warranty of seaworthiness in these circumstances.

In view of the apparent misunderstanding concerning the scope of admiralty and maritime jurisdiction, the scope of state remedial rights and the breadth of state substantive power, it is appropriate for this HONORABLE COURT to rehear the above-entitled action.

IV.
Argument

On December 13, 1971, this HONORABLE COURT ruled that the facts at bar in the above-entitled action did not support a cause of action for unseaworthiness. The Court said that federal maritime law could only apply if the case were within the admiralty and maritime jurisdiction of the federal district court. This case was held to be without said admiralty and maritime jurisdiction.

A. THE FEDERAL DISTRICT COURT DID POSSESS JURISDICTION OF THE CASE.

1. *The Case Is Within The Admiralty And Maritime Jurisdiction Of Federal District Courts.*

Admiralty jurisdiction exists in the case at bar by virtue of the Extension of Admiralty Jurisdiction Act. The Act provides in pertinent part that:

> "The Admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damages or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."
>
> Act of June 19, 1948, ch. 526, 62 Stat. 496, 46 U.S.C. §740 (1964) (hereinafter cited Extension Act).

Traditionally, jurisdictional statutes are not to be read literally and are not to be construed as abstract collections of words. They derive their meaning from their setting in history and practice, with due regard to the consequences of the construction given them.

> *Romero* v. *International Terminal Operating Co.*, 358 U.S. 354, 364 fn. 20, *reh. denied* 359 U.S. 962 (1959).

Thus, in *Gutierrez* v. *Waterman Steamship Corp.*, 373 U.S. 206 (1963), the Court gave an expansive interpretation of the word "caused" in the Extension Act. Admiralty and maritime jurisdiction was held to extend to causes of action under the warranty of seaworthiness arising ashore. The interpretation was justified upon review of the types of activity engaged in by "seamen." It was understood that "seamen" frequently were ashore in the service of their ship. While ashore "seamen" would be injured by defective things about a ship. It was sufficient, in terms of causation, that the "impact" of the defect was felt ashore at a time and place not remote from the wrongful act which caused said defect.

This expansive approach has resulted in the rule that if the faulty land-based equipment which caused the injury

complained of was involved in the loading or unloading of the vessel, that equipment became appurtenant to the vessel.

> See, e.g., *Huff* v. *Matson Navigation Co.*, 338 F.2d 205 (9th Cir. 1964), *cert. denied*, 380 U.S. 943 (1965); *Gebhard* v. *S. S. Hawaiian Legislator*, 425 F.2d 1303 (9th Cir. 1970).

Once the equipment is designated as being "appurtenant," jurisdiction exists.

> *Gebhard* v. *S.S. Hawaiian Legislator*, supra.

The decisions since *Gutierrez* have consistently recognized that Admiralty and Maritime Jurisdiction extends to injuries caused by an appurtenance of the vessel. The test of whether a piece of equipment is an appurtenance is not whether it is on the dock or on the ship but rather in what type of work it was engaged.

> *Deffes* v. *Federal Barge Lines Inc.*, 361 F.2d 422 (5th Cir. 1962); *Huff* v. *Matson Navigation Co.*, supra; *Spann* v. *Lauritzen*, 344 F.2d 204 (3rd Cir. 1965); *Gebhard* v. *S.S. Hawaiian Legislator*, supra; *Olvera* v. *Michalos*, 307 F. Supp. 9 (S.D. Tex. 1968); *Chagois* v. *Lykes Bros. S.S. Company*, 432 F.2d 388 (5th Cir. 1970).

The machine need not be in physical contact with the vessel but, as with the *Sieracki* seaman, merely "performing . . . a . . . function essential to maritime service . . . ," *Seas Shipping Company* v. *Sieracki*, 328 U.S. 85, 97 (1946), and thus "... in the service of the vessel . . . ," *Alaska S.S. Co.* v. *Petterson*, 347 U.S. 396, 399 (1954). If the machine qualifies as appurtenant then clearly an accident caused thereby is "caused by a ship" within the meaning of the Extension Act.

2. *The Case Is Within The Diversity Jurisdiction Of The Federal District Courts.*

Diversity jurisdiction may be invoked to permit the plaintiff to prosecute a cause of action for unseaworthiness.

The opinion rendered on December 13, 1971, recognized the existence of federal district court diversity jurisdiction under 28 U.S.C. §1332 (1964). It is well settled that admiralty and maritime actions may be subject to diversity jurisdiction.

> *Romero* v. *International Terminal Operating Co.*, supra at 370.

A diversity court must, of course, apply the maritime rights and remedies to which a state court would refer.

> *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1935). But see Stevens, *Erie R.R.* v. *Tompkins* and The Uniform General Maritime Law, 64 Harv. L. Rev. 246 (1950); *Canella* v. *Lykes Bros.*, 174 F.2d 794 (2nd Cir.), *cert. denied* 338 U.S. 859 (1949).

In fact, state legislatures and state courts have provided and applied state remedies to vindicate rights in admiralty.

> *Romero* v. *International Terminal Operating Co.*, supra at 373-74.

The "savings to suitors" clause in 28 U.S.C. §1333 (1964) reflects pre-Constitution state authority and permits state legislatures and courts to preserve maritime rights by means of creating and applying remedies sounding in common law.

> *Romero* v. *International Terminal Operating Co.*, supra at 373-74. See also *Just* v. *Chambers*, 312 U.S. 383 (1941); *The Hamilton*, 207 U.S. 398

(1907). See generally *De Lovio* v. *Boit,* 7 Fed. Cas. 418 (Case No. 3776) (C.C. Mass. 1815).; Stevens, supra at 251.

In particular, state legislatures have provided remedial legislation in the form of jurisdictional grants to state courts which permit the entertainment of suits similar to the one at bar.

See, e.g., *Buljanouic* v. *Grace Lines, Inc.,* 295 N.Y.S. 2d 552, 31 A.D. 2d 614 (1968) where state court exercised jurisdiction over seaworthiness claim of longshoreman injured on pier by shore-based equipment.

The fact that a federal admiralty court does not have jurisdiction of the above-entitled action should not serve to invalidate a state remedy. To the contrary, it has been held that the content of the General Maritime Law controls the scope of federal admiralty and maritime jurisdiction.

See generally *American Insurance Co.* v. *Canter,* 26 U.S. (1 Pet.) 511 (1828); Black, Admiralty Jurisdiction: Critique and Suggestions, 50 Col. L. Rev. 259, 274 (1950).

An opposite approach would create in Congress the ability to deny to states the rights reserved to them under Article III, Section 2.

See generally *De Lovio* v. *Boit,* supra.

Denial could be achieved through the simple refusal of Congress to endow inferior federal courts with admiralty jurisdiction. For this Court to approve of such denial would constitute a serious abridgment of state rights.

> "From the admiralty clause of the Constitution, this Court has drawn probably greater substantive law-making powers than it exercises in any other area of the law. See, e.g., *The Osceola,* 189 U.S. 158, 23 S.Ct. 483, 47 L.Ed. 760. Broad as are the implications of this clause, it does not authorize this Court to decide as a matter of policy, wholly untrammeled by the historic roots of admiralty, what relief may be sought exclusively in the federal admiralty courts and what may be concurrently given by the State courts."
>
> Dissent of Mr. Justice Frankfurter in *Madruga v. Superior Court,* 346 U.S. 556, 566-67 (1954).

The reason for limiting Congressional power to restrict State court jurisdiction by removing federal admiralty jurisdiction is clear. There has been no authoritative suggestion that Congress has granted to federal admiralty courts all jurisdiction capable of being granted under Article III.

> Black, supra at 274. Compare expanded grant of admiralty and maritime jurisdiction in Extension Act with prior grant of admiralty and maritime jurisdiction in 28 U.S.C. §1333 (1964).

Indeed, it must be recognized that Congress is not obligated to extend lower federal court jurisdiction to the limits permitted by the Constitution. Conversely, Congress could well suspend all federal admiralty jurisdiction. Therefore, if Congressional grants of admiralty jurisdiction were held to limit state authority to provide state remedies, the Constitution could not prevent the Congress from wholly quashing the ability of states to provide said remedies by simply eliminating federal admiralty jurisdiction. This

result would contravene time honored understandings of the interstitial nature of the federal system.

De Lovio v. *Boit,* supra; Stevens, supra at 251.

There should be no complaint that the state remedy sought to be enforced relates to jurisdiction.

> See, e.g., *Guarantee Trust Co.* v. *York,* 326 U.S. 99 (1945) where it was held that state statute of limitations which foreclosed the exercise of state court jurisdiction was binding on a diversity court as outcome determinative. See also *Romero* v. *International Terminal Operating Co.,* supra at 362.

B. The Substantive General Maritime Law Permits Recovery On The Facts At Bar.

Even if the opinion rendered on the 13th of December was not based solely on the jurisdictional issue but also on the basis that the nature of the case did not justify the application of the substantive General Maritime Law, the opinion was in error. The substantive content of the General Maritime Law specifically relates to the issues at bar and permits recovery on these facts.

1. *Federal Maritime Law Permits Recovery On These Facts.*

The federal maritime law consists of past federal judicial decisions and Congressional statutes promulgated pursuant to Constitutional standards.

The Lottawanna, 21 Wall. 558 (1875).

The Congress revises and supplements the federal maritime law under the authority of the "arising under" clause of Article III, Section 2 and the "commerce" clause of Article I, Section 8.

> *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36 (1943).

The warranty of seaworthiness, however, is principally a creation of federal "judge-made" law and its application has expanded within recent years because of judicial efforts.

> See *Mitchell* v. *Trawler Racer, Inc.*, 362 U.S. 539 (1960) which traces the history of that doctrine.

It may now be said that:

> "Seaworthiness is not limited, . . . to fitness for travel on the high seas; it includes fitness for loading and unloading."
>
> *Gutierrez* v. *Waterman Steamship Corp.*, supra at 213.

A proper application of the doctrine of seaworthiness is:

> ". . . in essence that things about a ship, whether the hull, the decks, the machinery, the tools furnished, the stowage, or the cargo containers, must be reasonably fit for the purpose for which they are to be used."
>
> *Id.*

> ". . . [t]he duty to provide a seaworthy ship and gear, including cargo containers, applies to longshoremen unloading the ship whether they are standing aboard ship or on the pier."
>
> *Id.*, 373 U.S. at 215.

The cases expanding the applicability of the warranty of seaworthiness to facts similar to those at bar are identified in Respondent's Brief and well described therein.

In determining the geographic scope of the warranty of seaworthiness, reference to precedent should be made sparingly and with considerable care. The peculiar nature of the right and remedy involved precludes comparisons with other maritime laws and doctrines. It is clear, for example, that completely different considerations are present when comparing the geographic scope of federal compensation law with that of seaworthiness law.

> See, e.g., *Reed* v. *Steamship Yaka,* 373 U.S. 410 (1963) where federal pre-emptive compensation act was held not to preclude the application of the warranty of seaworthiness in areas where the federal act would apply. The delimiting considerations behind the scope of federal compensation law were distinct from those determining the application of the warranty of seaworthiness. It may hardly be suggested that compensation law can do by implication in this case what it could not do by direct conflict in *Reed.*

Similarly, precedent concerning the provision of an exclusive federal pre-emptive compensation remedy occupying a void created when state compensation remedies were ruled unconstitutional,

> *Nacirema Operating Co.* v. *Johnson,* 396 U.S. 212, 216-217 (1969),

would also seem to be irrelevant in determining the applicability of a non-exclusive alternative federal remedy where no pre-emption is at issue.

2. *The December 13, 1971 Opinion Unnecessarily Restricted The Applicable Law To "Federal" Maritime Law.*

> "The question presented here is whether state law or federal maritime law governs the suit of a longshoreman injured on a pier while driving a forklift truck which was moving cargo that would ultimately be loaded aboard ship."

Mr. Justice Frankfurter wrote in commenting on the "savings to suitors" clause in §9 of the Judiciary Act of 1789 that

> "Whether Congress thereby recognized that there were common law rights in the States as to matters also cognizable in admiralty, or whether it was concerning only with 'saving' to the States the power to use their Courts to vindicate rights deriving from the maritime law to the extent that their common law remedies may be available, is a question on which the authorities do not speak with clarity."
>
> *Caldarola* v. *Eckert,* 332 U.S. 155, 157 (1947). See also *Romero* v. *International Terminal Operating Co.,* supra at 375.

The existence of this question has resulted in the statement that admiralty and maritime law should not be considered only "federal" in nature.

> "Although the corpus of admiralty law is federal in the sense that it derives from the implications of Article III evolved by the Courts, to claim that all enforced rights pertaining to matters maritime are

rooted in federal law is a destructive oversimplification of the highly intricate interplay of the States and the National Government in their regulation of maritime commerce."

Romero v. *International Terminal Operating Co.*, supra at 373.

There are many state rules of law which are both substantive and procedural in nature and which are deemed to be part of the corpus of the General Maritime Law.

". . .the source of law in savings-clause actions cannot be described in absolute terms. Maritime law is not a monistic system. The state and federal governments jointly exert regulatory powers today as they have played joint roles in the development of maritime law throughout our history."

Id., 358 U.S. at 374. See also *Lynn Hirkaldy* v. *Alcoa Chemical Transport Co.*, 1971 A.M.C. 1019 (S.D. Tex. 1970) where state law of products liability was used as part of General Maritime Law in creating both a right and remedy in admiralty.

In *Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375 (1970), this Court considered the law of the various states when a uniform cause of action for wrongful death was forged for the General Maritime Law. It is therefore unlikely that any real objection can be posed to lower federal courts which refer to state substantive law when dealing with admiralty matters where the voids of the federal maritime law offer no guidance.

3. *State Contributions to the Substantive General Maritime Law Permit Recovery in the Above-Entitled Action.*

It has been held that state substantive law may be considered in determining whether a cause of action exists under the Merchant Marine Act of 1920, 46 U.S.C. §688 (1964), otherwise known as the Jones Act.

> See, e.g., *Edmond* v. *American Hawaiian S.S. Co.*, 65 N.Y.S. 2d 433, 187 Misc. 723, aff'd 85 N. Y.S. 2d 915, 274 App. Div. 1035 (1946) where a state court held that pleading a Jones Act claim did not prevent the application of state law concerning negligence where that law did not conflict with federal maritime law.

It is not surprising, therefore, that state courts have applied their own standards in determining that the warranty of seaworthiness related to shoreside injuries to longshoremen caused by shoreside equipment.

> See, e.g., *Buljanouic* v. *Grace Lines, Inc.*, supra.

C. THE OPINION OF DECEMBER 13, 1971 MISREPRESENTS THE STATUS OF THE GENERAL MARITIME LAW, AND THE ABOVE-ENTITLED ACTION SHOULD BE REHEARD EVEN IF THE RESULT REACHED IN SAID OPINION IS DEFENSIBLE.

The December opinion will be quite destructive of the uniformity developed heretofore in the corpus of the General Maritime Law.

If the decision is taken to be jurisdictional, substantial conflicts may develop where a party proceeds in admiralty as opposed to at law under the Merchant Marine Act of 1920, 38 Stat. 1185, 46 U.S.C. §688 (1964). In *Hopson* v.

Texaco, Inc., 383 U.S. 262 (1966), this HONORABLE COURT allowed seamen to recover at law for injuries sustained thirty-eight miles inland from the ship while said plaintiffs were in the service of said ship. If the plaintiffs had elected to proceed in admiralty, the opinion of December 13th herein would prevent the court from exercising admiralty and maritime jurisdiction. Uniformity of subject-matter jurisdiction would be destroyed and the election characteristic of the Jones Act effectively quashed.

If this Court were to attempt to distinguish admiralty and maritime jurisdiction under the Jones Act from admiralty and maritime jurisdiction under the warranty of seaworthiness, the Court would effectively reverse its original statement that the scope of admiralty and maritime jurisdiction limits the application of the warranty of unseaworthiness. Furthermore, a decision that admiralty and maritime jurisdiction varied with the type of cause of action prosecuted would have the effect of expanding and contracting such jurisdiction on a purely ad hoc basis. Uniformity would be destroyed.

A denial that admiralty jurisdiction lies herein also compels the consideration of whether or not state remedies exist under the "savings to suitors" clause. Such consideration in turn compels the kind of complex decisions cautioned against being made in *Romero* v. *International Terminal Operation Co.*, supra at 375.

Lastly, if the decision were jurisdictional, serious questions would arise as to the nature of state and federal relationships. The interstitial nature of the federal system would be modified so that Congress would be capable of removing all state powers in admiralty by merely restricting federal admiralty court jurisdiction. The "savings to suitors" clause and the Constitutional balance of admiralty authority recognized therein would be contravened.

Assuming the opinion to be substantive in nature, confusion arises as to the meaning of the terms "loading" and "unloading." The language in *Gutierrez* and the precedent evolving therefrom are in hopeless conflict with the language of the December 13th opinion.

A substantive analysis also compels the consideration of the questions reserved in *Caldarola* and *Romero* concerning the extent to which states are permitted to contribute to the substantive General Maritime Law. These issues are the most difficult of all to resolve and require labors not heretofore spent.

The methodology adopted by the December opinion is itself misleading. This HONORABLE COURT suggested that the substance of the General Maritime Law be limited in application by the Congressional grant of admiralty and maritime jurisdiction. This suggestion, as previously noted, is counter to the position held by substantial authority in the field.

V.
Conclusion

The opinion rendered December 13, 1971 in the above-entitled action is misleading and the case should be reheard. If rehearing is denied and the opinion is permitted to stand, the status of the General Maritime Law will be radically altered. Conflicts will arise in the state and federal courts concerning the scope of admiralty jurisdiction, and victims of personal injuries will be refused recovery unjustly. The basis of the December opinion was not in fact considered at length by either petitioner or respondent in written or oral argument. Further, the matters discussed in said opinion have been identified and reserved by this Honorable Court on prior occasions. Reason dictates that a full and complete hearing on the issues is justified now.

VI.
Certificate of Service

I, David B. Kaplan, representing Amicus Curiae the American Trial Lawyer's Association and as a member of the Bar of the Supreme Court of the United States, hereby certify that on the 12th day of January, 1972, I served three (3) copies of the foregoing Brief on Victory Carriers, Inc., Gulf Stevedore Corp., Inc. and Bill Law by mailing to same in duly addressed envelopes with first class postage prepaid to Hon. George Wood, 510 Van Antwerp Building, Mobile, Alabama 36601, Hon. W. Boyd Reeves, 1101 Merchants National Bank Building, Mobile, Alabama 36602, and Ross Diamond, Jr., 610 Van Antwerp Building, Mobile, Alabama 36601.

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